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May 6, 2011

Attention: Docket No. EP 699

Honorable Daniel Elliott, III
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Hello Dan,

I apologize for not going through the channels on this commentary. I tried, but could find those channels. This is the fastest way I know to make comments on arbitration. It has been a long time since I was involved in arbitration, but I think I remember the principles well enough to start a dialog on it. Based on my professional knowledge of the Class I railroads (all post-Staggers Act) the greatest problem would be getting any of them to believe it is in their best interest to allow a third party other than the STB or a court to resolve a dispute. Getting them to include arbitration provisions in their transportation contracts would be a major hurdle. It should not be a problem with utilities, who have used arbitration for dispute resolution for several decades.

I hope to make at least two points: (1) Do not think there will be a wholesale acceptance of arbitration by the railroad industry. Utilities have used it for years in their coal supply agreements, so you only have one side to convince: the railroads. (2) Do not think there is any particular attraction to having a case settled by any panel of lawyers that excludes industry experts. Even if you could get the railroads to agree, I doubt if the utilities would. Unfortunately, speedier awards does not outweigh the value of having one's case heard by an expert in his industry.

Every time arbitration has become accepted it has been the result of a slow piecemeal process. It is now widely accepted in shipping disputes, but that was not always the case. The Society of Maritime Arbitrators was not formed until the early sixties. It is one of the few arbitration groups that still have a high percentage of laymen experts in their membership. Mining industry arbitration was not widely accepted in the late seventies, when I began my experience with coal mining and electric utility arbitration. However, the American Arbitration Association began setting up local offices in the early eighties whose primary job was selling various industries on the attractiveness of using arbitration for dispute resolution. By the late nineties arbitration had become quite popular in some industries, notably the construction industry. It

had also become popular with a certain group of lawyers, whereas many lawyers initially disliked it.

One of the attractions of arbitration was and still is the ability to request and get arbitrators who are learned in the field being disputed. That feature began disappearing in the late nineties when the AAA started removing large numbers of industry experts from their rolls. They were not the only ones to do so. The international arbitration groups such as USCIB started removing industry experts from their rolls, ignoring the fact they were removing one of their main selling points. If a disputing party thought the case would be decided by a panel of lawyers excluding industry experts, he often saw very little advantage to arbitration over law suits. The attractiveness of speedier awards is much harder to sell without the added feature of industry experts as arbitrators. Having said this I believe the presence of an attorney on every arbitration panel is essential avoid procedural problems.

In my opinion it would be difficult, if not impossible to convince the railroads as an industry to accept arbitration. However, it might be possible to convince ONE of the majors to try it, or if that failed perhaps a smaller railroad would be willing to try. I see little choice but to approach it slowly, as has been done before in other industries.

Here is one example of a "selling point" that might be used in an initial discussion: Absent specific experience to the contrary, one might imagine that both parties would want rail rates to be "off the table" for arbitration, but there might be some unforeseen reasons for wanting it after the transportation agreement has been signed. For example, fuel clauses usually provide for price adjustments based on the price of diesel fuel at a specified location, but what would happen if the railroad's actual price of diesel fuel were to suddenly skyrocket beyond that reference price, possibly due to some local force majeure event? In such a case the railroads might be anxious to renegotiate the price, particularly if they faced a long remaining term of contract. Lacking no contractual ability to compel resolution, they might have no choice but to sue the shipper. In most cases a demand for arbitration could produce quicker results. I will provide another illustration in a follow-on filing, one which may be attractive for railroads.

If you would like to discuss further, just give me a call or send me an email. I'll answer you as quickly as I can. It was a pleasure talking to you at the NCTA 2011 Spring General Conference.

Blessings,
Dave Gambrel
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You may like to have a few of my credentials:

- Chief technical advisor to Peabody Coal Company litigation and arbitration teams, 1974-1981
- Director of Transportation, Peabody Coal Company, 1980-1995. Business dealings with most Class I railroads in North America.
- Member, Commercial Panel, American Arbitration Association, 1980-1998
- Served as chief arbitrator in case involving St. Joe Minerals mining materials case, and party-appointed arbitrator in Ramada Inn construction case.
- BSEE, MSEE, PE